

chapter four

Environmental impact assessment

Introduction

Environmental Impact Assessment (EIA) is a process for ensuring that decision-makers are informed of the environmental impacts of activities. EIA also seeks to allow the public to participate in the decision-making process and improve the quality of those decisions. In the ACT there are currently two EIA processes that may apply, one under the ACT *Planning and Development Act 2007*, the other under the Commonwealth *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act).

However, under the EPBC Act the Commonwealth minister can enter agreements with the states and territories to transfer responsibility for assessment and approval to them. To date agreements have only been reached to transfer the responsibility for assessment to the states and territories. At the time of writing only the ACT and Victoria had not yet entered such a bilateral agreement, though agreements have been drafted. No approval agreements have been entered into. Approval still rests with the Commonwealth minister.

The EPBC Act and bilateral agreements are discussed in the second half of this chapter.

ACT legislation

Introduction

Commencing operation in March 2008, the *Planning and Development Act 2007* (ACT) (Planning Act) replaced the *Land (Planning and Environment) Act 1991* (Land Act), but planning is still administered by the ACT Planning and Land Authority (ACTPLA) and the Minister for Planning, referred to in this part of the chapter as the minister. The new Act introduced a number of significant reforms to the EIA process in the ACT, which are set out below.

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- The Planning Act distinguishes between the environmental

assessment required for strategic level planning proposals, for example, amendments to the Territory Plan (TP), grant of leases, amendments to plans of management, and the environmental assessment required for development proposals. At the strategic level a Planning Report (PR) or Strategic Environmental Assessment (SEA) is prepared whilst an Environmental Impact Statement (EIS) is prepared for development proposals (Part 5.6 and Part 8.2).

- The Planning Act does not require a Preliminary Assessment or Public Environment Report for the environmental assessment of development proposals. An EIS is now the sole method of environmental assessment of a development proposal that is likely to have an impact on the environment (Part 8.2).
- The Planning Act does not permit the EIS and development application (DA) processes to run concurrently—a completed EIS is now a pre-requisite to a DA being lodged in the impact track unless the minister has granted a proponent an exemption from this requirement under s.211 (s.127—Impact track—development applications).
- The Planning Act is consistent with the requirements of the EPBC Act, paving the way for the Commonwealth to refer assessment of a development proposal requiring EPBC Act approval to the ACT (see second half of this chapter).
- The Planning Act makes provision for a more informal inquiry panel model—an independent expert inquiry panel model has been adopted in preference to the Royal Commission-style inquiry powers found in the Land Act (Part 8.3).
- The Planning Act contains an eight-part definition of ‘environment’, enabling the EIS process to be used for the assessment of the social impacts of a development proposal. Under Schedule 4 an EIS is required for a proposal to deconcessionalise a lease (Item 11, Part 4.3, Schedule 4), the EIS replacing the Community Needs Assessment previously carried out for the assessment of the social impacts of a proposal to remove the concessional status of a lease.

Assessment of strategic level planning

Strategic environmental assessment

A SEA is a comprehensive environmental assessment that may be prepared in the early planning stages of a major land use policy initiative (s.99). The SEA is intended to assess the social, economic and environmental impacts of major development plans, changes in planning policy and major plan variations.

ACTPLA must prepare a SEA:

- for a major variation to the TP (s.103)
- if directed by the minister (s.100)—for example, the minister may direct ACTPLA to prepare a SEA for a draft plan variation (s.62) or for a draft plan of management (s.322).

ACTPLA may also prepare a SEA if satisfied that it is necessary or convenient to do so in relation to an object of the Planning Act (s.100). A SEA may therefore be used to assess whether proposed development contributes to the orderly and sustainable development of

the ACT, is consistent with the social, environmental and economic aspirations of the people of the ACT and is in accordance with sound financial principles (s.6).

The SEA process

Chapter 2 of the Planning and Development Regulation 2008 (Planning Regulation) sets out the elements of the SEA process, comprised of five stages:

- stage A—setting context and establishing baseline
- stage B—developing alternatives and deciding scope
- stage C—assessing environmental benefits and impacts
- stage D—consultation
- stage E—monitoring, if a decision is made at stage C that monitoring is required.

It should be noted that although this process is presented in a linear form in the Planning Regulation, the process is more organic in nature and fluid than this presentation would suggest. Consultation is a recurring consideration and activity throughout the process. A consultation plan is prepared as part of Stage D but this is generally done during Stage A or Stage B so that a consistent approach to consultation is adopted and it is clear who the stakeholders to be consulted are. Consultation may be required:

- during Stage B when the scope of the SEA is being decided
- during Stage C after the environmental benefits and impacts have been assessed against the scoping document
- as a discrete stage if the draft SEA (which may have been revised in response to comments made during Stage C) is to be made available for final public comment prior to the SEA being finalised and used to inform planning policy.

The fluidity of the process means that it can be adapted to assessment of a variety of planning policy initiatives.

What must a SEA address?

A SEA must address the scoping document prepared during Stage B—developing alternatives and deciding scope (r.14). In preparing the SEA ACTPLA must, under r.14, assess the environmental benefits and impact of a proposal having regard to the following:

- the probability, duration, frequency and reversibility of the effects of the proposal
- the cumulative nature of the effects of the proposal, both positive and negative, and any identified alternatives to the proposal
- whether the effects of the proposal are likely to extend outside the ACT
- the risks to any identified environmental values identified in the scoping document or identified or targeted in relevant plans such as *The Canberra Spatial Plan*, *The Climate Change Strategy 2007-2025*, or threatened species management plans
- the magnitude and spatial extent of the effects of the proposal
- the effects of the proposal on areas or landscapes that have a recognised local, regional or national protection status.

The SEA must also consider how the environmental impacts can be managed through mitigation, offsetting, avoidance or some other method (r.14).

Planning reports

A Planning Report (PR) is a report prepared to inform a decision to grant a lease or prepare a variation (other than a major variation) to the TP (s.97). ACTPLA must prepare a PR if directed by the minister, for example, the minister may direct ACTPLA to prepare a PR for a draft plan variation (s.62) or prior to granting a lease (s.245). ACTPLA may otherwise prepare a PR if satisfied that it is necessary or convenient to do so in relation to an object of the Planning Act (s.98). As for a SEA, this means that a PR may be used to assess whether proposed development contributes to the orderly and sustainable development of the ACT, is consistent with the social, environmental and economic aspirations of the people of the ACT and is in accordance with sound financial principles (s.6).

Whilst s.97 of the Planning Act provides that a regulation may prescribe what must be included in a PR, the Planning Regulation does not as yet contain any provisions relating to what a PR must address.

Assessment of development proposals

Environmental Impact Statement

An Environmental Impact Statement (EIS) is a document that assists the ACT government and the general public to understand the environmental impact a development proposal would have if it were to go ahead as planned. It is different to a PR or SEA in that it focuses on an individual development rather than development at the strategic planning level. An EIS is not prepared for strategic level planning proposals such as amendments to the TP or plans of management or the grant of leases.

When is an EIS required?

An EIS can be initiated through the Planning Act, the *Environment Protection Act 1997* (ACT) and the *Public Health Act 1997* (ACT).

Under the Planning Act, an EIS is required if the development proposal is in the impact track. Development proposals which are in the impact track (see Chapter 3), and therefore require an EIS are those:

- listed in the relevant TP development table for the zone as being impact assessable
- listed in Schedule 4 of the Planning Act
- not provided for elsewhere, that is, it is not an exempt development and the development table does not state which assessment track applies
- for a use that is an authorised use but beginning the use is a prohibited development.

Under the Planning Act, an EIS must also be prepared if:

- under s.124 the minister has required it
- under s.125 the Health Minister has declared an application to be s.125-related, thus requiring the preparation of an EIS.

Section 134 of the Public Health Act in effect provides that an EIS can be required for developments that might have a significant effect on public health. To date there have been no examples where this has occurred.

Section 94 of the Environment Protection Act provides that an EIS can be required for activities (not subject to development application) that might cause significant environmental harm. To date there have been no examples where this has occurred.

The EIS process

Under the Planning Act development is classified as being exempt, assessable or prohibited, and assessable development is further split into ‘tracks’ based upon the complexity, nature and scale of development—that is, the code track, the merit track and the impact track. Impact track developments, being at the higher end of the track system, undergo the broadest assessment compared with the other tracks. Impact track developments are assessed against not only the specific rules and criteria listed in the TP but also against an EIS. As noted above, a development will be impact track assessable if it is identified in a development table of the TP as being impact track assessable, is a development of a kind mentioned in Schedule 4 of the Planning Act, is not provided for elsewhere (that is, it is not an exempt development and the development table does not state which assessment track applies) or the development is for a use that is an authorised use but beginning the use would otherwise be prohibited. See Chapter 3 for discussion of development approvals.

After a development proposal is designated as a proposal for which an impact track development application must be made, the proposal is subject to a staged assessment and approval process. The first stage is comprised of an EIS process and the second stage is comprised of the application and approval process.

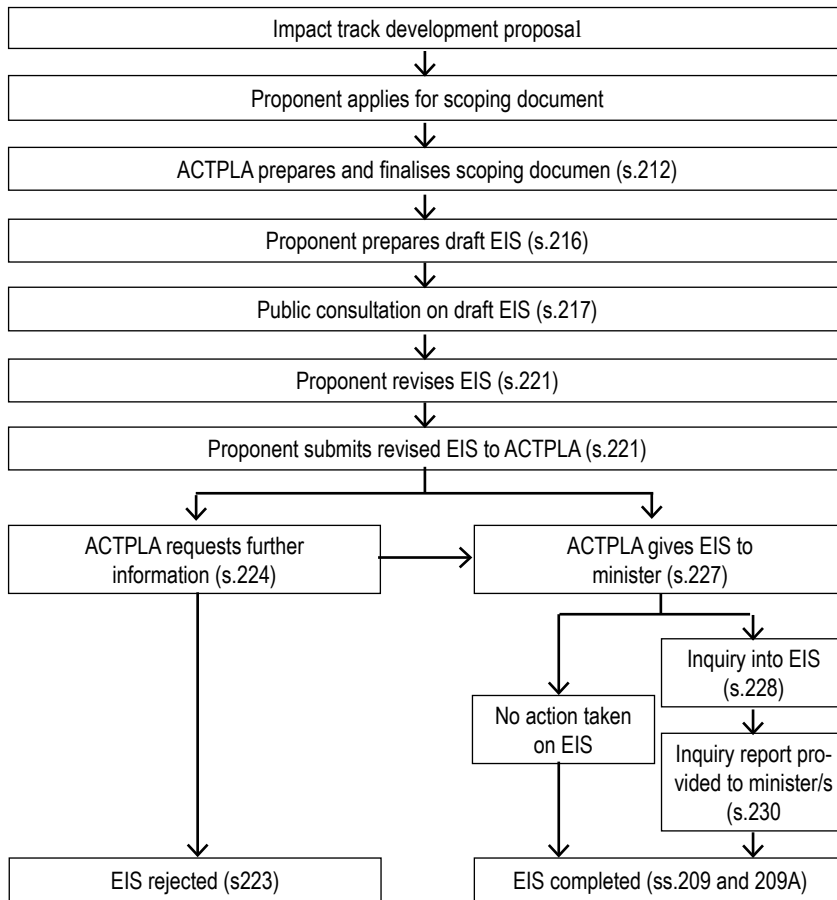
The EIS process is described in Chapter 8 of the Planning Act and is represented diagrammatically on the next page.

What is a scoping document?

A scoping document is a written notice prepared by ACTPLA that sets out the matters that must be addressed by the proponent in preparing the draft EIS (s.213). The scoping process entails:

- identification of the environmental impacts a development proposal will or may have and presentation of these matters in an initial scoping document
- consultation with prescribed entities regarding the matters to be addressed that have been identified in the initial scoping document (for the entities that must be consulted and the entities that may be consulted see r.51)
- ACTPLA consideration of the information received as a result of this restricted consultation and finalisation of the scoping document
- provision of the finalised scoping document to the proponent.

The scoping document must include any minimum content for scoping documents prescribed by the Planning Regulation (r.54). ACTPLA may also include in the scoping document a requirement that the proponent engage a consultant to help prepare the EIS (s.213).



The scoping document must be provided to the proponent no later than 30 working days after the application is made unless the Chief Planning Executive (the CEO of ACTPLA) has allowed a further period for provision of the scoping document (s.214). A scoping document is valid for 18 months after the day the document is given to the proponent (s.215).

Who prepares an EIS?

An EIS is generally prepared by the proponent, that is, the person proposing the development or the person or territory authority designated by the minister as the proponent under s.207. As noted above, ACTPLA may, however, require that the proponent engage a consultant to help prepare an EIS for the proposal (s.213).

The proponent is not required by ACTPLA to engage a particular consultant. The proponent is able to engage a consultant of the proponent's choice provided that the consultant is a person that ACTPLA is satisfied holds professional qualifications relevant to preparing an EIS, has experience in preparing an EIS, and the capacity to prepare an EIS (r.55).

What must the EIS address?

Both the draft EIS and revised EIS (see below) must address each matter that is raised in the scoping document for the development proposal. The Planning Regulation provides a detailed list of the items that must be included in an EIS (r.50). After the revised EIS is submitted to ACTPLA, it is assessed to determine whether it has sufficiently addressed each matter raised in the scoping document (s.222). If a matter has not been sufficiently addressed, ACTPLA may provide the proponent with a further opportunity to address any outstanding matters (s.224). Failure to sufficiently address the matters raised in a scoping document may lead to ACTPLA refusing to accept the revised EIS (s.223).

How can the public participate in the EIS process?

The public has the opportunity to participate in the EIS process when the draft EIS is publicly notified (s.217). After the draft EIS is submitted to ACTPLA, it places a notice on its website and in the *Canberra Times*. The information publicly notified includes the availability of the draft EIS for public inspection for a minimum period of 20 working days (s.218) plus details of how and when representations can be made on the draft EIS (s.217).

Members of the public are entitled to make written submissions which must be received by ACTPLA by the closing date indicated for the EIS (s.219). ACTPLA provides no specific guidelines on how to prepare a submission, however there is a specific suggestion on the ACTPLA website that the grounds for any objections should be clearly stated. Submissions can be provided to ACTPLA in person, by post, email or fax. (See Contacts list at the back of this book.)

Representations may be withdrawn at any time before ACTPLA has accepted the revised EIS (s.219). Under s.220 of the Planning Act, submissions are available on the ACTPLA website until the EIS is completed or the representation is withdrawn. The proponent must consider any representations made during the public consultation period in the preparation of the revised EIS (s.221).

Inquiry

The Planning Act allows the minister to establish an inquiry under s.228. Although the Health Minister may decide that an inquiry should be established, it remains the responsibility of the Planning Minister to establish an inquiry. The Planning Minister appoints the person or persons to constitute a panel to conduct the inquiry, determines the terms of reference for the inquiry, notifies the proponent of the inquiry and notifies the terms of reference under the *Legislation Act* (ss.228 and 229).

The minister must appoint persons with the necessary expertise to the inquiry panel and is not permitted to appoint the following persons: the Chief Planning Executive; a member of staff of ACTPLA; a member of staff of the Land Development Agency; or a person prescribed by regulation.

A panel of inquiry must conduct its business having regard to the general procedural requirements for inquiries found in Part 4.2 of the Planning Regulation and must not be directed by the minister as to the findings or conclusions the panel should reach (s.231).

When is the EIS process complete?

Under s.209, if the minister has given ACTPLA notice that he or she has decided to take no action in relation to an EIS, or at least 15 working days have elapsed since receiving the EIS from ACTPLA, and the minister has not decided in that time to establish a panel to inquire about the EIS, then the EIS is regarded as being completed and the minister cannot thereafter establish an inquiry. If the minister has made a decision to establish an inquiry no later than 15 working days after receiving the EIS from ACTPLA, then the EIS is not completed until the Inquiry Panel has submitted a timely report or the Inquiry Panel has failed to produce a report by the stipulated date for reporting.

Section 209A (s.125-related EIS) works on the same premise as s.209, albeit complicated by the addition of the Health Minister to the process. Decisions must still be made in a timely manner by both the Planning and Health Ministers or the EIS is completed and an inquiry cannot thereafter be established.

Sections 209 and 209A are indicative of the time-frame-driven nature of the Planning Act and the commitment of ACTPLA to meeting timeframes and deadlines. These sections highlight for the Planning Minister and the Health Minister the importance of making timely decisions with respect to establishing inquiries. These sections also highlight for an inquiry panel the consequences of the panel failing to produce a report in a timely manner. Failure on the part of either the ministers or the panel to act in a timely manner will result in an EIS being presented uncritically as part of an impact track development application. The significance of failure of this nature is that the adequacy of the EIS cannot be commented upon by the public during the time for representations on the relevant impact track development application (s.156(6)). Representations can only be made with respect to the manner in which the impact track development application responds to the EIS. It should be noted that the EIS process may be regarded as completed under s.209 or s.209A irrespective of any intention of the minister to present the EIS to the Legislative Assembly (s.227).

What is the outcome of the process?

Once the EIS is completed the proponent may submit an impact track development application for the development proposal under s.127. As with the EIS process, referral entities may comment on the impact track development application (s.149) and the public has the opportunity to comment on the development application during the 15 working days public consultation period (ss.130 and 157 and r.28). Impact track development applications must be decided within 30 working days after lodgment of the application if no representations are made or 45 working days if representations are made (s.131). (For more detail on the development application process refer to Chapter 3.)

Commonwealth EPBC Act

Introduction

Activities or development undertaken in the ACT may trigger the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). This is not unique to the ACT as the EPBC Act can equally be triggered in other states and territories.

By triggering the EPBC Act, a development may need to be assessed and approved under the EPBC Act, in addition to the requirements under ACT legislation.

All references in the remainder of the Commonwealth section of this chapter to the minister are to the Commonwealth Minister for Environment, Heritage and the Arts; references to the department are to the Commonwealth Department of the Environment, Water, Heritage and the Arts; and all section numbers are to the EPBC Act unless stated otherwise.

The department's website includes extensive and detailed information about the operation of the EPBC Act (see Contacts list at the back of this book).

Actions requiring assessment and approval

The EPBC Act prohibits any person from taking an action that will have or is likely to have a 'significant impact' on a matter protected under a provision of Part 3 of the Act without the approval of the minister (s.67A).

An 'action' is broadly defined in the EPBC Act to include a project, development, undertaking and an activity or series of activities or an alteration of one of these things (s.523). However, the definition of action expressly excludes:

- a decision by a government body, including government agencies and local councils, to grant a 'governmental authorisation' for another person to take an action
- a decision by a government body to provide funding by way of a grant.

The matters protected under Part 3 can be divided into the following two categories:

- matters of national environmental significance
- matters relating to actions by the Commonwealth, Commonwealth agencies and actions on Commonwealth land.

There are a number of exemptions from these requirements, which are discussed below.

What is a significant impact?

The EPBC Act provides no guidance on the meaning of 'significant impact'.

Administrative guidelines have been prepared by the department to assist proponents to determine when a proposed action may have a significant impact on a matter of national environmental significance and consequently whether it should be referred to the minister for assessment and approval. Copies of the guidelines are available at the EPBC Act page of the department website (see Contacts list at the back of this book). While helpful, these guidelines are not legally binding.

The Federal Court considered the meaning of significant impact in the case of *Booth v Bosworth* ((2001) 114 FCR 39). This case concerned a lychee farmer using electric grids to kill Spectacled Flying-foxes from the adjacent Wet Tropics World Heritage Area. The court suggested that a significant impact under the EPBC Act is one that is 'important, notable or of consequence' having regard to its context or intensity. In this case the court found that the killing of large numbers of the flying-foxes on the farm was likely to have a significant impact on the world heritage values of the adjacent Wet Tropics World Heritage Area.

In determining the impacts of an action it is necessary to consider the potential direct and indirect (including cumulative) impacts of the action. In 2004 the Federal Court in the *Minister for Environment and Heritage v Queensland Conservation Council Inc and WWF Australia* (2004) 139 FCR 24 (the Nathan Dam case) considered the scope of impacts that must be taken into account when deciding whether a proposed action is a 'controlled action' which requires approval under the EPBC Act. In particular the Court considered whether indirect impacts of third parties should be considered when assessing the impacts of a proposed action.

The Nathan Dam case concerned a proposal to construct a dam on the Dawson River in Queensland. The case was primarily concerned with whether the impacts on the Great Barrier Reef from agriculture (and associated chemical application and run-off) which would be facilitated by the construction and operation of the dam should be considered an impact of the dam itself. The court found that the potential impacts of the irrigation of cotton were impacts of the dam.

The court held that the term impact is not confined to the direct physical effects of an action on a matter of national environmental significance. Rather, the term can include the indirect consequences of an action and may include the results of acts done by persons other than the proponent.

Matters of national environmental significance

There are currently seven matters of national environmental significance listed under Part 3 of the EPBC Act:

- world heritage values of declared World Heritage properties
- national heritage values of a national heritage place
- ecological character of declared Ramsar wetlands
- listed threatened species and ecological communities (other than vulnerable ecological communities)
- listed migratory species
- nuclear actions
- the environment in Commonwealth marine areas and Commonwealth managed fisheries.

Certain additional matters may be added without the agreement of the states and territories after consultation (through prescribing additional matters by regulation).

The matters of national environmental significance which are most likely to be of relevance to actions taken in the ACT are listed threatened species and listed threatened ecological communities. For example, the listed threatened ecological communities include the 'Natural temperate grassland of the Southern Tablelands of NSW and the Australian Capital Territory'. It is apparent that this endangered ecological community is currently being threatened by land clearing and residential development in the ACT. The department website contains an interactive search map to assist in identifying matters of national environmental significance located in a certain area. (See Contacts list at the back of this book).

Actions concerning the Commonwealth, its agencies and land

Under Part 3, Division 2 of the EPBC Act, approval is required for the following actions:

- those that have, will have or are likely to have a significant impact on the environment on Commonwealth land (s.26(2))
- those taken on Commonwealth land that have, will have or are likely to have a significant impact on the environment (anywhere) (s.26(1))
- those carried out by the Commonwealth or a Commonwealth agency that have, will have or are likely to have a significant impact on the environment (anywhere) (s.28).

‘Commonwealth land’ is defined broadly to include land owned or leased by the Commonwealth or a Commonwealth agency, and land in an external territory (except Norfolk Island) and the Jervis Bay Territory. Similarly, ‘Commonwealth agency’ is defined broadly to include a minister, body corporate established for a public purpose by a law of the Commonwealth, a company in which the Commonwealth owns more than half the voting stock, and a person holding an office under Commonwealth law (s.528). Certain exceptions apply, including a person holding an office under the *Australian Capital Territory (Self Government) Act 1988* and certain Indigenous organisations.

If an action has a significant impact on one of the matters of national environmental significance (discussed above) or relates to the Commonwealth and its land, then approval from the Commonwealth minister will generally be required. However, in some cases, an action will not need approval by the minister despite triggering the EPBC Act as described above. These key exceptions are covered in Part 4 of the EPBC Act and include an action that:

- has been declared by a bilateral agreement to not require approval because it is approved under an alternative arrangement (bilateral agreements are discussed below) (Division 1)
- is exempted by a ministerial declaration (Division 2)
- is covered by a conservation agreement (Division 3A)
- is covered by a regional forest agreement (Division 4)
- is authorised under the *Great Barrier Reef Marine Park Act 1975* (Division 5).

Further exemptions from the assessment and approval process under the EPBC Act are discussed below.

Referral process

A proponent of an activity that may have a significant impact on a matter protected under Part 3 of the EPBC Act is required to refer details of the activity to the minister. If a proponent fails to make such a referral, the minister may ‘call-in’ the action (s.70). Commonwealth, state and territory agencies may also refer actions proposed by another person to the minister (s.69(1)).

Individuals and community groups cannot formally refer action by other people or organisations to the minister. However if you want a proposal referred you can write to the state or territory agencies which do have the power to formally refer the matter and you may also contact the department to report the matter.

Upon receiving a formal referral, the minister must determine whether the activity must be approved, that is, whether the activity is likely to have a significant impact on a matter protected under Part 3 of the EPBC Act (s.75). If a proposed action does require approval it is called a 'controlled action'.

If the minister determines that an action is a controlled action, the relevant provisions of Part 3 must be identified as the 'controlling provisions' for the action. For example, if a proposal requires approval because it is likely to have a significant impact on a listed threatened ecological community, the controlling provisions are ss.18 and 18A that offer protection for those communities. The minister has 20 business days to determine whether an action is a controlled action and, if it is, which provisions will be the controlling provisions for the action (s.75(5)), unless further information is requested in which case the clock stops (s.75(6)).

Notice of all referrals is placed on the department's website (s.74(3)) (see Contacts list at the back of this book). Members of the public will be given 10 business days to submit comments on whether they believe the action is likely to have a significant impact on a matter protected under Part 3 of the EPBC Act (that is, whether it is a 'controlled action').

Environmental impact assessment process

If the minister determines that an action is a 'controlled action' and does require approval, an assessment must be carried out on the 'relevant impacts' of that action. The relevant impacts are potential impacts on the matters protected under Part 3 of the EPBC Act that the minister determined are likely to be affected by the proposal. For example, if an action is likely to have a significant impact on a listed threatened species, the assessment must address the potential impacts of the activity on the threatened species.

After the minister has determined what the controlling provisions are for an action, the proponent must provide preliminary information to assist the minister to decide which of the six possible methods of assessment, provided for in Part 8, should apply. The methods of assessment are:

- an accredited assessment process
- an assessment on referral information (Division 3A)
- an assessment on preliminary information (Division 4)
- a public environment report (PER) (Division 5)
- an environmental impact statement (EIS) (Division 6)
- a public inquiry (Division 7).

Assessments done on referral information are undertaken solely on the information that an applicant has provided when referring their action to the minister. This referral information must include a description of the proposed action, the nature and extent of its likely impact on the environment and any areas of national significance, plus a description of the flora and fauna and natural features (s.72(2), r.4.03 and Schedule 2 of the Regulations).

Where assessment is done on preliminary information it is undertaken on information provided in the referral form and any other relevant information identified by the minister.

Details on the numbers and types of assessments undertaken are available from the department's annual reports (see Contacts list at the back of this book). There have been no assessments by way of public inquiry since the EPBC Act commenced. In the ACT only seven actions have required Commonwealth approval and of these five have involved assessment on preliminary documentation and two involved assessment on referral information.

In choosing, the minister will have regard to the information provided by the proponent on the potential impacts of the proposed activity and any other relevant information available, and if the activity will be carried out in a state or territory, comments received from the relevant state or territory government (s.87). There is no opportunity for public comment on, or participation in, the decision of the minister as to the type of assessment to be undertaken.

Where assessments are carried out by way of PER, EIS or public inquiry, the minister will issue guidelines or terms of reference that identify what specific matters the assessment must address (ss.96A(1), 101A(1), 107(1)(b)).

Assessments may address impacts other than relevant impacts, however, they will only do so where the relevant action is to be taken in a state or territory and that state or territory has asked the minister to ensure that the assessment under the EPBC Act covers other impacts.

The proponent will generally be responsible for carrying out the assessment and preparing relevant assessment documentation. The key steps in the assessment processes (with the exception of public inquiries) and the person responsible for these steps are set out below:

- provision of preliminary information—proponent
- determination of assessment approach—minister
- preparation of guidelines for PER or EIS—minister
- preparation of draft assessment documentation—proponent
- publication of draft assessment documentation—proponent
- public comment period—public
- preparation of final assessment documentation, taking comment into account—proponent
- preparation of assessment report—secretary of the department

If the assessment is by way of public inquiry, after the proponent has provided preliminary information and the minister has determined the assessment approach, the minister will appoint commissioners to carry out the inquiry and will set their terms of reference (s.107). The commissioners have flexible powers in conducting the inquiry, including the powers to call witnesses, obtain documents and inspect places (Division 7 of Part 8). The inquiry must be held in public unless the commissioners believe it is in the public interest to hold all or part of it in private (s.110). The commissioners must report to the minister and publish their report, unless the inquiry, or part of it, was held in private (ss.121 and 122).

The responsibility for the preparation of documents and for carrying out necessary assessments will depend upon the terms of reference for the inquiry and how the commissioners decide to conduct the inquiry.

Bilateral agreements and accredited assessment

The EPBC Act allows the minister to enter into agreements with the states and territories under which the responsibility for assessing and/or approving actions can be transferred to the state or territory concerned. These agreements are called bilateral agreements. Where this occurs, actions that fall within the terms of the agreement will be exempt from the assessment and/or approval requirements under the EPBC Act, and will be assessed and/or approved under the relevant state or territory processes.

At the time of writing, South Australia, New South Wales, Queensland, Tasmania, Northern Territory and Western Australia had entered bilateral agreements with the Commonwealth, covering assessment procedures only. To date, no bilateral agreements covering approvals have been entered into; therefore all matters must still be referred to the Commonwealth minister for approval.

A bilateral agreement, which allows for the transfer of assessment responsibilities only, between the Commonwealth and the ACT has been drafted. At the time of writing this agreement is close to being finalised. An assessment bilateral agreement between the Commonwealth and Victoria has also been drafted. Copies of both draft agreements can be viewed on the department website (see Contacts list at the back of this book).

In some cases the minister may declare that other Commonwealth, state or territory assessment processes can be used for the purposes of a particular assessment under the EPBC Act. These are 'accredited assessment processes'. In order to accredit another assessment process, the minister must be satisfied that the process will adequately assess the relevant impacts of the action (s.87(4)). At the completion of the accredited assessment process, the relevant Commonwealth, state or territory agency must provide the Commonwealth minister with a report on the relevant impacts of the action. The minister must then decide whether to approve the action.

Environmental approvals

After the completion of the assessment process, the minister must decide whether or not to approve the proposed activity and, if it is approved, whether to impose conditions on the approval. The minister is required to make this decision within 20 days of the completion of the assessment process if the assessment is on referral information; within 30 days if the assessment is subject to a bilateral assessment or accredited assessment, within 40 days if the assessment is on preliminary documentation, subject to a PER or EIS, or by inquiry (s.130).

In making this decision the minister must consider matters relevant to the matters protected under the controlling provisions (s.136). The minister must also take into account:

- economic and social matters
- the principles of ecologically sustainable development, which include the precautionary principle, the principle of intergenerational equity, the protection of biodiversity, and proper pricing and incentive mechanisms
- any assessment report

- any public environment report or EIS
- any report of any public inquiry
- any comments given to the minister by another Commonwealth minister
- any other information the minister has on the relevant impacts of the proposed action.

The minister may also consider a proponent's history in relation to environmental matters (s.136(4)).

The minister has a broad discretion to impose conditions on an approval to protect the matter of national environmental significance or Commonwealth environment or to mitigate or repair any damage that might be caused by the action. Conditions attached to an approval may include provision of a bond or other security, independent environmental auditing, preparing or implementing management plans, carrying out specified environmental monitoring or testing or monitoring compliance with codes of practice (s.134).

The 2007-08 annual report of the department gives statistics for environmental impact assessment activities during the year and since the EPBC Act's commencement in July 2000. A total of 2,696 referrals have been made and decisions made on 2,567 of these referrals. Of these, the vast majority, 1,517, were not controlled actions so required no approval. Another 446 required no approval provided they were undertaken in a particular manner, that is, in the manner specified by the proponent in the referral documentation or specified by the minister. Only 603 of the referrals required approval and went on to one of the assessment processes. Of these 242 were approved, 231 were approved with conditions and seven actions were refused approval.

In 2007-08 decisions were made on the level of assessment required in 117 referrals:

Commonwealth assessments

- environmental impact statement—6
- public environment report—6
- referral information—4
- preliminary documentation—57

State/territory assessments

- bilateral assessment—35
- accredited process—9

There was one referral in 2007-08 where the proposed action was considered clearly unacceptable, so no other decision had to be made. The proposal was to cull Grey-headed Flying-foxes at Burdekin Park. This was the first such decision in the eight year history of the EPBC Act. Since 1 July 2008 until the time of writing three other decisions on referral have considered that the proposed action was clearly unacceptable. These were a proposal to release water from Lake Crescent into the Clyde River in Tasmania, a proposal to establish a rail line and coal port in the Shoalwater Bay Training Area in Queensland and a proposed residential development at Mission Beach in Queensland.

In the ACT in 2007-08 a total of 16 referrals under the EPBC Act were made. Four of these were controlled actions that progressed through to an assessment process; one referral did not require approval but was required to be done in a particular manner and 11 were not considered to be controlled actions. The four controlled actions and their requisite environmental assessment process were:

- the transfer of Department of Defence land at Majura—EIA on referral information

- development of the long-stay caravan park at Narrabundah—EIA on preliminary documentation
- extensions to the Crawford building at the ANU—EIA on preliminary documentation
- an extension of the taxiway at the Canberra airport—EIA on referral information.

There are a number of restrictions on the minister's power to approve activities that relate to matters of national environmental significance, which conservationists and other interested persons should consider when seeking to oppose an activity.

Penalties

The EPBC Act has parallel civil and criminal penalty provisions for some activities, for example, failure to obtain approval for an activity that has, or is likely to have, a significant impact on a matter protected under Part 3 of the EPBC Act may attract a criminal or civil penalty. In these cases the Commonwealth has the option of pursuing a criminal prosecution or seeking a civil penalty in the event of non compliance. The department must decide the most appropriate course of action to take against a person, that is, civil or criminal. In deciding this, the department may take into account matters such as the previous record of the person and the seriousness of the breach. A copy of the department's compliance and enforcement policy is available from their website (see Contacts list at the back of this book).

Failure to obtain approval for an activity that has, or is likely to have, a significant impact on a matter protected under Part 3 of the EPBC Act is a criminal offence. Severe penalties can be imposed for failing to obtain proper approval, including a civil penalty or fine of up to 50,000 penalty units (currently \$5.5 million) for a corporation and a fine of 5,000 penalty units (currently \$550,000) for an individual and/or a criminal penalty of seven years imprisonment and/or a \$46,200 fine. The offender may also be required to pay for the mitigation or repair for the environmental damage caused by the action (Divisions 14A and 14B of Part 17).

It is a criminal offence to breach a condition attached to an approval with maximum civil penalties of 1,000 penalty units (currently \$110,000) for an individual or 10,000 penalty units (currently \$1.1 million) for a corporation (s.142) or a criminal penalty of up to two years imprisonment and/or a fine of up to 120 penalty units (currently \$13,200). Failure to comply with the terms of an approval can also result in the suspension or revocation of an approval (ss.144 and 145).

Exemptions

There are a number of instances where actions can be exempt from both assessment and approval under the EPBC Act. Further, certain actions can be exempt from the assessment process, while still requiring approval under the EPBC Act. For example, under s.158 the minister can grant an exemption from specific provisions of the EPBC Act, including the entirety of the assessment and approval process, if the minister is satisfied that it is in the national interest that those provisions do not apply to the action. Notice of such exemptions, and the reasons for granting them, must be published on the department website (s.158(7)(a) and Part 16 EPBC Regulations 2000).

Other exemptions from the approval requirements are discussed above, for example exemptions for actions that are declared under a bilateral agreement not to require approval.

Opportunities for public participation

The opportunities for public involvement in the referral and assessment processes have been mentioned above. The following section gives more detail.

If a proposal is referred to the minister notification must be published on the department website and comments must be submitted within 10 business days (s.74(3)). Matters to be addressed in any submission must cover whether the proposed action is likely to have a significant impact on any matter protected under Part 3 of the EPBC Act, that is, whether it is a 'controlled action'.

If the action is to be assessed by PER or EIS, then the minister prepares guidelines for that process. At the discretion of the minister there may be an opportunity for public comment at this stage (ss.97(5) and 102(5)). The question to be addressed will be whether the guidelines are appropriate.

If the assessment is by referral information, preliminary documentation, PER or EIS, there is an opportunity for public comment. An invitation to provide comment is published in a national, state or territory newspaper, depending on the location of the action and, if practical, in a regional newspaper in the region affected. A notice is also published on the department website. The notification will include the time limit for comments, but it must be not less than 10 days for an assessment on referral information or preliminary documentation (s.93(3) and 95(2)) and not less than 20 days for a PER or EIS assessment (ss.98(3) and 103(3)).

As well as addressing the accuracy and thoroughness of that documentation, comments should address:

- potential impacts on matters of national environmental significance or other relevant matters protected under Part 3 of the EPBC Act (see above)
- social and economic issues
- history of the proponent in relation to environmental issues—any allegations made against the proponent must be supported by reliable evidence (see Chapter 12 for a discussion of defamation)
- conditions which should be attached to any approval.

Where assessment is by way of public inquiry it is usually because public involvement is seen to be necessary. However, whether objectors and third parties are given the opportunity to make written or oral submissions is at the discretion of the commissioners appointed to run the inquiry (Part 8, Division 7).

If the assessment is carried out by another Commonwealth department or a state or territory government under an accredited process or an assessment bilateral agreement, there will also be opportunities for public comment.

Legal review

Decisions made under the EPBC Act are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in the Federal Magistrates Court or the Federal Court. The EPBC Act makes special provision extending the category of persons who can apply for judicial review (s.487). However, there is no right of review of a decision of the minister to the Commonwealth Administrative Appeals Tribunal.

In certain circumstances, a third party, or the minister, can seek an injunction in the Federal Court to prevent a contravention of any of the provisions of the EPBC Act (s.475). The case of *Booth v Bosworth* (referred to above) involved a third party seeking an injunction to prevent a lychee farmer operating an electric grid to protect his crop as the grid was causing the death of thousands of Spectacled Flying-foxes, which the applicant argued was having a significant impact on a World Heritage listed property.

Conclusion

Activities that impact on the environment in the ACT may therefore require assessment under either the ACT legislation or the Commonwealth EPBC Act or both. Both are complex processes and this chapter has provided only a simple overview, but it highlights that there are at least some opportunities for public participation and comment in both processes.